



NARRAGANSETT INDIAN ADULT  
VOCATIONAL TRAINING PROGRAM,  
Complainant,

DATE: April 29, 1994

v.

Case No.: 93-JTP-19

UNITED STATES DEPARTMENT OF LABOR,  
Respondent,

and

RHODE ISLAND INDIAN COUNCIL INC.  
Intervenor

BEFORE: Lawrence Brenner  
Administrative Law Judge

ORDER RULING ON RESPONDENT'S ASSERTION OF  
THE DELIBERATIVE PROCESS/  
PREDECISIONAL PRIVILEGE

On April 7, 1994 the Respondent, United States Department of Labor ('Department'), filed an affidavit of the Deputy Assistant Secretary, Employment and Training Administration ('Affidavit') and the Grant Officer's Statement in Support of the Deputy Assistant Secretary's Assertion of the Deliberative **Process/Predecisional** Privilege ('Grant Officer's Statement'). Complainant, Narragansett Indian Adult Training Program ('Narragansett'), filed a response ('Response') on April 18, 1994.

At issue is whether the Department is obligated to disclose certain information redacted from two documents included as part of the Administrative File, or whether that information is protected by the deliberative process privilege. The information at issue consists of the names of Department employees who served on the advisory 'hierarchy task force' and the identities of the incumbent and non-incumbent applicants in states other than Rhode Island. In addition to the identity of incumbent and **non-incumbent** applicants' the Complainant adds in passing that it also seeks information as to the number and identity of applicants who were recommended for grants.

The deliberative process privilege protects from discovery certain information that is generated during the deliberation process. Wolfe v. Department of Health and Human Services, 839 F.2d 768, 773 (D.C. Cir. 1988). The rationale behind this privilege is to facilitate the free expression 'integrity' and independence of those responsible for making the determinations

which enable the government to operate. U.S. v. Hooker Chemicals & Plastics Corporation, 114 F.R.D. 100, 102 (W.D.N.Y. 1987). The privilege only applies to material reflecting the actual **pre-**decisional, mental or deliberative process. It does not apply to purely factual material or data which may be severed from an otherwise deliberative document. Nor does it apply to **post-**decisional explanations or interpretations of an existing government decision. Even where the privilege is applicable, competing interests, such as the relevance of the evidence to be protected, the availability of other evidence and the possibility that forced disclosure will inhibit future give and take by government employees, must be balanced in order to determine whether disclosure is appropriate. Id. Finally, it is noted that while the deliberative process privilege is often invoked by the government in response to Freedom of Information Act inquiries, the privilege may also be invoked during the course of litigation in response to a discovery request. See Hooker Chemicals, supra., Carl Zeiss Siftuna v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), Kaiser Aluminum & Chemical Corn. v. United States, 157 F.Supp. 939, 141 Ct. Cl. 38 (1958).

The Department contends at length that the deliberations and recommendations of the hierarchical task force members are a part of its predecisional process. The Deputy Assistant Secretary, Employment and Training Administration, avers that the hierarchical review process reflects the agency's consultative process and the opinions of agency staff; the employees involved in this process assist in the formulation of recommendations to the Grant Officer, but the ultimate decision regarding the designation of Native American grantees is made solely by the Grant Officer after reviewing information from a variety of sources including, but not limited to, the recommendations made by the hierarchical task force. Affidavit, at pp. 3 & 4.

In sum, the Department has put forward a persuasive case why the opinions, recommendations and thought processes of the members of the hierarchical task force implicate the decisional process privilege. The work performed by the task force reflects precisely the sort of predecisional recommendation on **decision-**making that is protected by the privilege. Hoover, at p. 102. Complainant in effect admits this where it states:

The facts sought by the Tribe are not deliberative, nor are they communications, advisory opinions, recommendations or deliberation. It is one thing to suppress preliminary notes and memoranda written during the development of a decision. . . . **[i]t** is quite another to shield a **committee's** identity ...

Response at p. 7. Therefore, I find that the recommendations made by the hierarchical task force and submitted to the Grant Officer fall within the privilege, including the number and identity of the tribes recommended for grants by the individual task force members.

In addition to this privileged information, the Complainant specifically request the following three matters for discovery:

- 1) the identities of the incumbent and **non-incumbent** applicants for PY 1993-1994 ... to see if there is a pattern of not giving tribes a preference;
- 2) the names of the Hierarchy Task Force members ... to see whether any of the members are known to be biased or have conflicts of interest; and
- 3) whose initials follow the handwritten sentence on AF, p. D-7 . . to check for bias and conflict of interest.

Response, at p. 4. Complainant requests limited information for a very limited purpose. At this point, I fail to see how the names of the Department employees participating on the hierarchical task force can be considered predecisional information. The Department is apparently concerned that release of the member names will necessarily lead to examination of their actual recommendations and underlying motives. Such an examination would, however, implicate the decisional process privilege and would necessarily be carefully scrutinized. In any event, such a discovery request is not now before me. Similarly, the identities of other incumbent and non-incumbent applicants does not amount to predecisional information and is not privileged.'

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<sup>1</sup> It is not entirely clear whether and under what basis the identity of the incumbent and non-incumbent applicants are confidential. Complainant avers, however, that **"there** is no other practically accessible source for us to develop this information." Response, at p. 5. Accordingly, that information must be provided by the Respondent. At page 9 of the Response, Complainant adds in passing that it is also interested in the number and identity of those tribes recommended for grants. This information comes directly from the hierarchical task force recommendation forms (Appeal File, D-2) and, as discussed, is protected under the decisional process privilege. Accordingly, only the identity of the incumbent and non-incumbent applicants must be produced.

More problematic, however, is Complainant's third request as to the name of the individual whose handwritten sentence appears at D-7. That handwritten statement indicates a factor upon which a task force member's recommendation was based. To require the Department to provide the name of the specific task force member has the potential effect of inhibiting predecisional opinions and recommendations by individual employees. This is contrary to the very purpose behind the privilege. The Complainant asserts it needs this information to "**check** for bias and conflict of interest". As this Order requires the Respondent to produce the names of individual members of the hierarchical task force, there is no need to require Respondent to also provide the identification of the individual whose handwritten sentence appears at D-7. Accordingly,

1) The Respondent is ORDERED to provide the Respondent with the name of the incumbent and non-incumbent applicants for PY 1993-94.

2) The Respondent is ORDERED to provide the Complainant with the names of those employees who served on the hierarchical task force during the **pendency** of Complainant's application for a Section 401 JTPA grant, including the names of persons who signed page D-7 of the Appeal File.

At Washington, D.C.

  
LAWRENCE BRENNER  
Administrative Law Judge

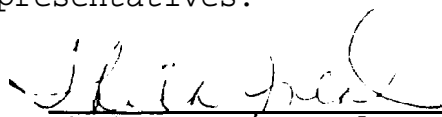
**SERVICE SHEET**

Case Name: Narragansett Indian Adult Vocational Training Program

Case No.: 93-JTP-19

Title of Document: Order Ruling on Respondent's Assertion of  
of the Deliberative Process Privilege

I, Sheila Joyce Neal, certify that on 4/29/94 the above-named document was mailed to the last known address of each of the following parties and their representatives.

  
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